SUPREME COURT

STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

MSC No.
COA No: 338733
Lower Case No. 16-010745-01
Wayne County Circuit Court

JACQUES JEAN KABONGO,

Defendant-Appellant.
_____/

WAYNE COUNTY PROSECUTING ATTORNEY
Attorney for Plaintiff-Appellee

SHELDON HALPERN (P14560)
Attorney for Defendant-Appellant
_____/

DEFENDANT-APPELLANT'S BRIEF IN SUPPORT

*****ORAL ARGUMENT REQUESTED*****

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II. WHETHER IT WAS AN ABUSE OF DISCRETION NOT TO GRANT A MISTRIAL WHERE PROSECUTION WITNESSES DELIBERATELY VIOLATED A COURT ORDER CONCERNING IRRELEVANT, NON-PROBATIVE, AND PREJUDICAL TESTIMONY THAT DENIED A FAIR TRIAL?

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Defendant-Appellant answers "Yes".

V. WHETHER DEFENDANT-APPELLANT DENIED 14TH AMENDMENT RIGHT TO TRIAL BY AN IMPARTIAL JURY BY TRIAL COURTS REFUSAL TO REMOVE JURORS FOR CAUSE?

Defendant-Appellant answers "Yes".

STATEMENT OF JURISDICTION

Pursuant to MCR 7.303(B)(1) and MCR 7.305, this Brief in Support of Application for Leave to Appeal the February 20, 2019 Order denying timely Motion for Reconsideration of the December 27, 2018 Michigan Court of Appeals Opinion and Order affirming conviction from Wayne County Circuit Court.

STATEMENT OF CASE

Statement of Proceedings:

Defendant-Appellant, Jacques Jean Kabongo, was convicted, after jury trial of carrying a concealed weapon, (MCL 750.27) and was sentenced on May 10, 2017 to 1 year non-reporting probation and 50 hours of community service. (Sent., 11)[1].

Appeal of Right was taken and the Michigan Court of Appeals affirmed his conviction in an unpublished Opinion and Order issued December 27, 2019. Timely Motion for Reconsideration was filed and denied by Order entered February 20, 2019.

Defendant-Appellant seeks Leave to Appeal.

Statement of Facts:

Kurt Hornung, works for Vent Craft heating and Cooling, and has been doing work on Defendant-Appellant Kabongo's properties; the last couple of years at a house on Monte Vista, and also on Defendant-Appellant's personal residence. (T II, 161-162).

On October 15, 2016, Mr. Hornung was replacing a furnace that had been stolen from the Monte Vista home. Mr. Hornung was working on the furnace as Defendant-Appellant Kabongo was painting the garage. (T II, 164). Defendant-Appellant Kabongo "had his gun on his right side and the hand part of it was sticking out of his pants so it was -- I saw it". (T II, 163).

[1] Transcripts designation: T I – March 30, 2017; T II – April 3, 2017; T III – April 4, 2017; Sent.- Sentencing May 10, 2017.

Mr. Hornung, using a drawing[2] in the court room, indicated to the jury where the truck was parked, as he had used the truck earlier to run up and buy a needed part for the furnace. (T II, 165). The only tools in the truck were on the front passenger side floor. (T II, 167) i.e. no tools were in the driver's side rear section, ergo, no reason for Defendant-Appellant to go into the street.

David Nicholson, is a friend and a coworker of Defendant-Appellant Kabongo; they both work at Blue Cross Blue Shield. (T II, 176). Mr. Nicholson is a CPL (concealed pistol license) holder and a NRA certified trainer. (T II, 178). Mr. Nicholson provided habit testimony that he has gone with Kabongo to property to help at least 3-4 times, and because it is a rough neighborhood, Kabongo always open carry's his weapon. (T II, 187). When at the Monte Vista house, Defendant-Appellant Kabongo would always open carry his weapon. (T II, 189).

Defendant-Appellant Jacques Kabongo has worked for Blue Cross Blue Shield for 20 years. (T II, 192). Mr. Kabongo lives in Ann Arbor, owns Detroit properties on Monte Vista and Appoline streets, another in Ypsilanti, and he also maintains a second home on Stansbury in Detroit that he uses instead of driving back to Ann Arbor during the week. (T II, 193).

[2] This drawing was labeled Exhibit C, and a photo taken by the prosecutor given to the jury. However, when counsel requested a copy of the Exhibit for purposes of appeal, the exhibit could not be found and the prosecutor provided some other photos, but counsel cannot attest that it is the same photo provided to the jury.

Mr. Kabongo had obtained a CPL in 2011, for his Glock 19; the purchase was registered and the sales record and gun registration were admitted as Defense Exhibit J. (T II, 194-196). Since he travels so much of the time, Mr. Kabongo decided not to renew his CPL license in light of the onerous restrictions for CPL holders, and the reality that the only time he needs protection is while on his own property and open carry is permitted. (T II, 197).

Defendant-Appellant Kabongo explained:

> "The thing is, as long as I'm transporting the firearm safely with the ammunition separate from the firearm in a case, which I'm not inclined to carry the firearm in the first place because it just seems to be more of a hassle than anything, but in times that I would need it I knew I could be open carry… only purpose of gun is for safety at that property It's not the safest area. You know, I'm saying that nicely. And that would be the only reason I would need, you know, my firearm on that property." (T II, 197-198).

On the day in question, Kabongo went to the truck, on the passenger side, where the tools were on the floor: hacksaw, staple gun, measuring tape, brush and paint tray. (T II, 201-202). He was walking back to the house when police stopped him: Both his hands were holding tools he had taken. (T II, 202). Mr. Kabongo was never in the street, and, never covered up as he was exercising his right to open carry. (T II, 203, 208).

On that day in question, Royer Hernandez, DPD officer, second precinct was with his partner on patrol. (T II, 28). Contrary to court order, this Officer told the jury:

"We, basically, we go for known offenders. We deal with drugs, guns, anything that comes with violent crimes." (T II, 28). Hernandez was working with his partner,

Officer Alexander Collrin. (T II, 31). Officer Collrin told Hernandez to look at the Defendant-Appellant while driving. (T II, 33).

According to Hernandez:

> "Yes, the defendant was walking toward the street. At that time he had a weapon which was holstered and exposed which is an open carry weapon. I didn't think much of it….He was walking eastbound towards the street of Monte Vista when we first saw him kind of similar to what my weapon is. It's open carry….We continued going northbound at a slow speed. Mr. Kabongo proceeded to walk into the street into a pickup truck that was parked in front of the house it was a four door pickup truck." (T II, 34-35).

Officer Hernandez indicated there was nothing illegal about what he had seen; it was the observations made in his mirror that forced Hernandez to arrest Defendant-Appellant:

> "The vehicle was a four-door pickup truck. He walked to the driver's passenger side which we all know a four-door pickup truck has the rear passenger side. He opened up the passenger. It appeared he was grabbing tools at that time. I continued to make my observation of Mr. Kabongo using the mirror on the vehicle so I
> turned it that way….I see Mr. Kabongo he opened up the driver's passenger door. He had a blue shirt on that day. He grabbed his blue shirt and he covered his weapon." (T II, 37-38).

Officer Hernandez claimed Kabongo fully concealed the weapon as he was looking through the rear view mirror. (T II, 38). Hernandez explained:

> Based on my observations prior I had observed him open carry and then conceal the weapon. I knew that, in fact, what he had on his hip was a weapon. So I asked him if he had a concealed pistol license to carry the weapon concealed. (T II, 38-39).

Officer Hernandez asked Defendant-Appellant for his CPL and was told it was expired, had expired 9-12-2015; he gave it to Collrin to run lien on the name. (T II, 41). He disarmed Mr. Kabongo and advised him that he was under arrest for carrying a concealed weapon. (T II, 42). There was no other illegal activity, though the officers said Kabongo had 2nd amendment right to carry, but not conceal the weapon. (T II, 43).

During cross-examination, Officer Hernandez was impeached with his detailed police report in which he indicated that Defendant-Appellant Kabongo never went out into the street and that the alleged offense (CCW) had been committed while Kabongo was retrieving tools from the passenger's side of the truck, not the driver's side. (T II, 51-52).

Officer Hernandez agreed that had his testimony at trial been consistent with his report, it would have been physically impossible to have seen Defendant-Appellant commit the alleged concealment (the open door would block such view), on the passenger side of the truck. (T II, 53).

Hernandez claimed he had checked the video system of the cruiser he was driving, and the video was functioning. (T II, 32). Officer Hernandez was asked about the video, since he claimed it had been functioning that day, but no video was ever produced to be examined: the prosecutor's objection was sustained. (T II, 69).

Robin Rodgers, DPD officer with the technical services bureau; she tried to locate the video from scout car. (T II, 73). She looked but was not able to find or extract the video because the video card had been full as of August 19th, 2017 and there were no videos

from August 19, 2017 through October 17, 2017. (T II, 74-75, 82). It appeared to this Officer that videos had been stopped a month earlier than this incident. (T II, 82).

DPD Officer Alexander Collrin, has been an officer for over 10 years, and was working with Hernandez on October 15, 2016. He was in front passenger seat. (T II, 88-89). Collrin told the jury he saw Jacques Kabongo walking down the driveway, eastbound along the driveway approaching towards Monte Vista. (T II, 90).

Contrary to the order entered, with confirmation by the prosecution, Officer Collrin told the jury: "I advised my partner of my observations and then my intention was to the narcotics location that I had a complaint on." (T II, 96).

Like his partner, Collrin said the concealment occurred when Defendant-Appellant was returning to the house, after being in the street on the driver's side of the truck. (T II, 104-105).

When impeached with his own report over critical facts where the report says Defendant-Appellant was at the passenger side, not driver's side of the truck, retrieving his tools Collrin says his report does not reflect his testimony at trial, because some words in the report are wrong such as the report saying Kabongo was retrieving items from the passenger side. (T II, 120). Officer Collrin also claimed his report was also wrong because his report does not say Defendant-Appellant ever went out into the street, which is directly contrary to trial testimony. (T II, 121).

The jury deliberated and then sent out a jury note requesting to see the police reports submitted by Collrin and Hernandez. The trial court, over defense objection, simply told the jury the police reports were not admitted into evidence (T III, 55-56) and, of course,

the jury had been instructed that they may consider only what has been admitted into evidence. Defense counsel objected because the jury was not instructed that the police reports were used for impeaching the witnesses, and, therefore, may be considered by the jury in determining credibility of the officers. (T III, 58). Within less than 2 hours, Defendant-Appellant was found guilty of carrying a concealed weapon. (T III, 58-59).

ARGUMENT

I. DEFENDANT-APPELLANT DENIED A FAIR TRIAL BY TRIAL COURT'S REFUSAL TO PROPERLY INSTRUCT THE JURY WHICH ALLOWED A CONVICTION WITHOUT SUFFICIENT EVIDENCE.

Standard of Review:

Trial court's factual findings are reviewed for clear error. *People v Cress*, 468 Mich 678, 691 (2003). Trial court rulings are reviewed for abuse of discretion. *People v Hine*, 467 Mich 242, 250, (2002). Claims of constitutional error are reviewed de novo. *People v Rodriguez,* 251 Mich App 10, 25, (2002).

In this case, each police officer reported the incident, in the course of business, stating therein that Defendant-Appellant was seen trying to cover his open-carry firearm when he was retrieving tools from the **front passenger side** door. (T II, 51-52). The problem is, that from the description of the police officers of where they drove and how and when they allegedly saw Defendant-Appellant conceal his weapon, it was apparent and acknowledged that it would have been physically impossible to view such event. At trial, the officers' testimony contradicted their police reports, and placed Defendant-Appellant out in the street, on the **driver's side** of the vehicle to retrieve the tools from the passenger backseat. (T II, 38).

There was no dispute that the tools were in the front seat of the vehicle on the passenger side. In other words, there was no reason for Defendant-Appellant to have gone out into the street to retrieve the tools—nor, of course, did either officer record that he did so.

In *Speigner v. Jago,* 923 F2d 427 (6th Cir. 1991) the Court found that the preponderance of the evidence supported the petitioner's guilt, but since it fell short of proof beyond a reasonable doubt, they were required to reverse. See also *U.S. v Stewart*, 145 F3d 273 (CA 5, 1998): "A verdict may not rest on mere suspicion, speculation or conjecture, or on an overly attenuated piling of inference on inference."

Stated another way, where the proofs, taken most favorably to the prosecutor, present no more than a choice between competing probabilities, a judgment of acquittal must enter. *U.S. v Saunders*, 325 F 2d 840 (CA 6, 1964), and *U.S. v Leon*, 534 F2d 667 (CA 6, 1976).

Defendant-Appellant raises an issue of insufficient evidence, acknowledging the officer's testimony at trial, but raised herein to preserve the issue, and to demonstrate the very weak evidence offered to establish guilt. It is under these circumstances that prejudice may properly be considered. The Michigan Court of Appeals ignored these matters resulting in an objectively unreasonable application of established law and clear error.

This was a credibility contest. Defendant-Appellant, and another witness, together with the police reports indicated Defendant-Appellant never went into the street to remove tools from the truck. The police at trial testified contrary to their respective police reports, were utilized for impeachment on cross-examination and, thus, in the trial record.

During deliberations, the jury sent out a note:

> THE COURT: I received a note from the jury from Corporal Dyer at 10:47 this morning that states can we please see a copy of both police reports. My inclination, counselors, with your concurrence would be to bring the jury back here and advise them that police reports are not part of the evidence in this case. (T III, 55). (Emphasis added)

Defense counsel objected and asked the court to instruct the jury on the proper use of the police reports as impeachment evidence; and may be considered for that purpose. The trial court refused the request and without "concurrence", did not so instruct the jury. (T III, 58). Within an hour and a half the jury reached a verdict. (T III, 58).

Where "evidence is admissible for one purpose, but not others, the trial court must give a limiting instruction upon request." *People v Basinger,* 203 Mich App 603, 606; 513 NW2d 828 (1994). A trial court must instruct the jury regarding the applicable law. A criminal defendant has a right to a properly instructed jury, and a requested instruction which is supported by the evidence must be given. MCL 768.29; *People v Rodriguez,* 463 Mich 466, 474; 620 NW2d 13 (2000). Error requiring reversal based on the failure to give requested instructions only occurs if the requested instructions were substantially correct, were not substantially covered in the charge given to the jury, and concerned an important point in the trial so that failure to give them seriously impaired the defendant's ability to present a defense. *People v Moldenhauer,* 210 Mich App 158, 159-160; 533 NW2d 9 (1995).

The instruction requested by defense counsel, was more than substantially correct; was not covered in the general charge to the jury; and was the very essence of the defense. The trial court was required to so give the limiting instruction as a matter of law. *Moldenhauer*, supra. Instead of giving the proper instruction, the trial court ***misstated*** the law on the use of the police statements, essentially instructing/responding to the jury's request for the police statements, that said statements did not constitute evidence.

Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the issues to be decided by the jury. *People v Dobek*, 274 Mich App 58, 82 (2007). Relief is merited where the error affected the defendant's substantial rights or otherwise undermined the reliability of the proceedings. "It is error for the trial court to give an erroneous or misleading jury instruction on an essential element of the offense." *People v Petrella,* 424 Mich 221, 277; 380 NW2d 11 (1985).

The jury's verdict hinged upon the use and nature of the police reports utilized by the defense attorney on cross examinations of the officers as impeachment evidence. An essential part of their deliberations was to determine the credibility of the witnesses and the facts as a result. The jury specifically asked for the reports which each officer acknowledged/described their observations of the alleged concealment (CCW) in such manner as to obviate the possibility of such observation (crime) and which admittedly contradicted their testimony of each. In response, over the defense attorney's reasoned objection, the judge refused the jury's request, told the jury the reports were not evidence and told the jury essentially to ignore and disregard the impeachment evidence. In other words, to ignore and not rely upon the impeachment evidence offered, and instead instructed, contrary to law, that the evidence could not be utilized to find the police officers were not credible. This error was outcome determinative.

The Michigan Court of Appeals avoided the ultimate question and turned its analysis sideways, evading the legal issue presented:

> Although MCR 2.513(O) gives a court discretion to provide a deliberating jury with any exhibits or writings *admitted into evidence*, because the police reports were never admitted as evidence, the court did not abuse its discretion by not providing them. The court also did not abuse its discretion by the manner in which it responded to the jury's question. The court simply explained that it was not providing the police reports because they were not admitted into evidence. The instruction directly responded to the jury's request.
>
> Defendant argues that the court's instruction misled the jury into believing that the police reports could not be considered in evaluating the police officers' testimony. However, the court merely instructed that the police reports had not been admitted into evidence. The instruction did not foreclose the jury from relying on the officers' testimony about their reports in evaluating the credibility of their testimony. Accordingly, there was no error.

Defendant-Appellant submits there was clear error for the Court to have considered an instructional issue out of the context presented by the record; the jury, after having been fully instructed and deliberating, sent a note requesting the police reports used during the trial, solely, to impeach the testifying officers with prior inconsistent statements.

The Michigan Court of Appeals ignored this aspect/context implicit in the jury's request, namely, that its deliberations required that it review/consider the content of the police reports utilized by defense counsel for impeachments so as to continue its deliberations.

Instead, the police reports, not having been admitted into evidence, it was certainly proper they not be provided—nor is that the issue raised herein. The Michigan Court of Appeals countenanced the trial court's response that "…simply explained that it was not providing the police reports because they were not admitted into evidence" and,

"…did not foreclose the jury from relying on the officers' testimony about their reports in evaluating the credibility of their testimony."

Defendant-Appellant submits it is clear error where the Court of Appeals made an objectively unreasonable assumption based upon an objectively unreasonable determination of the facts to, thereupon, conclude that the jury was not thereby foreclosed from the theoretical (unmentioned) possibility that they, the jury, explicated that it may, nevertheless, consider the content of the police reports utilized for impeachment, a far-reaching supposition.

The clarifying instruction requested was more than appropriate, it was crucial and would have explained the use of impeachment evidence. In a fundamentally fair trial the trial court would have had those portions of the testimony utilizing the police reports as prior inconsistent statements reread to the jury or, de minimus, instructed the jury to rely upon their memory of the prior inconsistent statements. To refuse to do so impermissibly interfered with the right to confront witnesses. Here the witnesses were confronted with evidence that the judge told the jury was not evidence and not to consider the same.

Thus, the jury, without the requested instruction, could only reasonably conclude from the trial court's response, that any consideration of the police reports and the statements contained there were not in evidence, and, hence, improper to be considered.

"The judge's instructions to the jury as to the law and how the evidence should be assessed are crucial to a fair trial. They should guide the jury's deliberations and are not mere technicalities in our legal system." *Houston v. Dutton,* 50 F.3d 381, 385 (6th Cir. 1995).

The jury was told in M Crim JI 2.5 "When it is time for you to decide the case, you are only allowed to consider the evidence that was admitted in the case. Evidence includes only the sworn testimony of witnesses, the exhibits admitted into evidence, *and anything else I tell you to consider as evidence*; and in M. Crim JI 2.24 "I may give you more instructions during the trial, and at the end of the trial I will give you detailed instructions about the law in this case. You should consider all of my instructions as a connected series. Taken all together, they are the law you must follow."

The composite instructions in M Crim JI 3.5 provided that evidence is what the judge "told you to consider as evidence" and "At times during the trial, I have excluded evidence that was offered or stricken testimony that was heard. *Do not consider those things in deciding the case. Make your decision only on the evidence that I let in, and nothing else*."

In M Crim JI 4.5 the jury was told it could consider the prior statements of the officers being instructed: "You have heard *evidence* that, before the trial, [officers] made [a statement] that may be inconsistent with [their] testimony here in court. You may consider an inconsistent statement made before the trial to help you decide how believable the [witnesses'] testimony was when testifying here in court."

The reference to evidence in this instruction is inconsistent in scope as to the mention of evidence in the other instructions and does not clarify that the evidence of the prior inconsistent statement is the statement, not the report and while the report was not evidence, the statement was evidence to help determine credibility.

During deliberations the jury asked for the written statements of the officers and was told that the statements had not been admitted as evidence with no other clarifying instruction. As this Court noted "the court merely instructed that the police reports had not been admitted into evidence", which, without clarification, restricted them from such consideration.

The trial court refused to provide the requested clarifying instruction concerning the proper use of prior inconsistent statements and impeachment evidence; and that the inconsistent statements made in police reports, could still be considered when determining the credibility of the officers.

As a result, the jury was led to believe any consideration of the prior inconsistent statements was prohibited as the trial court had instructed them to consider as evidence only what the judge told them and the judge told them the police reports containing the prior inconsistent statements were not evidence. Thus, the jury was effectively prohibited from considering the prior inconsistent statements when determining credibility of the officers whose testimony at trial differed.

The Court of Appeal's ruling is based upon an objectively unreasonable assumption that somehow jurors, not trained in law, will understand the difference between impeachment and substantive evidence and, thereby, be able to finesse its way through the instructions that contain an underlying theme that evidence is only what the judge tells the jury is evidence and, nevertheless, somehow, determine on their own to consider the utilized content of the unadmitted police reports when deliberating.

Defendant-Appellant submits the last instruction given by the trial court to the jury's request for the reports obviously needed to continue deliberations, had the effect of telling the jury that the statements in the police report could not be considered at all when determining credibility, and here, credibility of the officers was the outcome determinative issue to be resolved. "[T]he error affected the outcome of the lower court proceedings" and a new trial is warranted. *People v Cameron*, 291 Mich App 599, 617;806 NW2d 371 (2011).

This error was preserved, a contemporaneous objection was made and review of the issue was not limited. The trial court committed clear error and abused its discretion when refusing to give the requested instruction. That instruction was both a reasonable and a necessary instruction to prevent violation of constitutional rights to present a defense and to a fundamentally fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment. A new trial is merited. *People v Dobek*, 274 Mich App 58, 82 (2007).

This Court must grant leave to appeal and use this case to as a means of advancing the jurisprudence of jury instructions and the interplay of substantive and impeachment evidence during deliberations.

II. IT WAS AN ABUSE OF DISCRETION NOT TO GRANT A MISTRIAL WHERE PROSECUTION WITNESSES DELIBERATELY VIOLATED A COURT ORDER CONCERNING IRRELEVANT, NON-PROBATIVE, AND PREJUDICAL TESTIMONY THAT DENIED A FAIR TRIAL.

Standard of Review: Findings of fact are reviewed for clear error. *Sands Appliances Serv v Wilson,* 463 Mich 231, 235 n2, 238 (2000); *People v Kalchik*, 160 Mich App 40, 47 (1987); MCR 2.613(C). The standard of review on the rulings of law is whether the court committed error, *People v Thomas,* 438 Mich 448 (1991), which involves review de novo. *People v Babcock*, 469 Mich 247, 253 (2003). Issues of constitutional law are reviewed de novo. *People v Grant*, 470 Mich 477, 484 (2004).

Defendant-Appellant was arrested while the police officers were conducting special operations and investigating a marijuana grow operation in the area; the police saw Defendant-Appellant with a legally, open-carry gun as they were driving, verbally noted it and upon their allegation of Defendant- Appellant, thereupon, putting his shirt over the gun, stopped and arrested him.

During a status conference, the trial court granted defense motion limine that the officers would not mention they were part of special operations, nor that they were investigating narcotics because of the non-probative and prejudicial nature of such information. (Hrng, 3/15/2017, 15-16).

In compliance with a motion in limine, just before the trial began, the prosecutor confirmed that the police officers were informed not to discuss job title as special operations

or nature of their work, or that they were following up on a report of marijuana growing. (T II, 5).

The very first witness called by the prosecution was Royer Hernandez, a DPD officer from the second precinct, who promptly told the jury:

> "We, basically, we go for known offenders. We deal with drugs, guns, anything that comes with violent crimes." (T II, 28).

The jury was excused so the defense could place an objection on the record and move to dismiss for violation of the court order. (T II, 28-29). The Motion to Dismiss was denied by the trial court. (T II, 31).

Officer Hernandez' partner, Collrin, was not any better, telling the jury:

"I advised my partner of my observations and then my intention was to the narcotics location that I had a complaint on." (T II, 96).

Objection was made, and the jury excused, and another Motion for Mistrial made because of the reference to the narcotics location. (T II, 96). The trial court denied the Motion for Mistrial. (T II, 98).

These were not volunteered, non-responsive interjections into the trial. The prosecutor asked these questions to elicit the prohibited testimony. Perhaps most important, is that the prosecutor had told the officers, and assured the Court, that the officers would not provide inadmissible, non-probative, prejudicial testimony that imparted Defendant-Appellant as a bad person with a gun.

If somehow, this Court finds the testimony was only a volunteered answer that injects improper evidence into a trial, Defendant-Appellant notes such a finding would be

an objectively unreasonable inference given this was the subject of both pretrial rulings and affirmation made by the prosecutor. Here, the prosecutor knew in advance that the witness would give the prohibited testimony, or even worse, that the prosecutor conspired with the witness to introduce the prohibited testimony; under either scenario, a new trial is required. *People v Hackney,* 183 Mich App 516, 531; 455 NW2d 358 (1990).

"A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial." *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

By painting Defendant-Appellant as a known offender involved in narcotics, without any evidence justifying the same denied the presumption of innocence, and improperly provided the jury with extraneous information ordered non-admissible in this trial. Furthermore, the action was intentional and flagrant.

The Michigan Court of Appeals rejected this issue, "[b]ecause any irregularity did not impair defendant's ability to receive a fair trial, the trial court did not abuse its discretion by denying defendant's motion for a mistrial." Defendant-Appellant submits the Michigan Court of Appeals committed clear error, and made unreasonable determination of facts in light of the record.

This is not a case involving a singular impropriety. Both police officers, in contravention of the order granted in limine, offered that they were looking for violent known offenders, and at the time of arrest, the officers were responding to a reported narcotics operation on that block.

The prejudice from each instance merited granting a mistrial; when taken together a new trial with an untainted jury was warranted. *People v Cooper*, 236 Mich 643, 659-660 (1999).

The harm and prejudice cannot be overstated. Initially, the prejudice and harm has been acknowledged where the trial court following a full hearing thereon, granted the defense motion in limine in the first place based upon both relevance and prejudice arguments. Secondly, this was a close case that hinged entirely upon credibility determinations of the police officers versus Defendant-Appellant and witness Hornung. The abject arrogance of the prosecution in its disdain of the Order of the Court, introduced evidence designed to taint the Defendant-Appellant and unfairly influence the credibility determination by the jury, thus, preventing a fair trial. This Court should grant leave to appeal, vacate the conviction and remand for a new trial sending a clear message that such contumacious behavior by violating a court order, especially one entered to provide a defendant a fair trial, will no longer be countenanced.

III. PROSECUTORIAL MISCONDUCT IN MISLEADING THE JURY ABOUT AN EXHIBIT DENIED A FAIR TRIAL AND THEN FAILING TO PRESERVE THE EXHIBIT INTERFERED WITH APPELLATE RIGHTS.

Standard of Review:

This Court reviews "de novo claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial." *People v Ackerman,* 257 Mich App 434, 448; 669 NW2d 818 (2003), lv den 469 Mich 1005 (2004).

The drawings made by defense counsel were used during cross examination of each officer. The prosecutor however in redirect, added to the drawing through Officer Collrin. (T II, 122-123). Those additions were in green pen. (T II, 123).

Before closing arguments, the jury instructions and exhibits were being discussed, and the prosecutor sought to introduce a screenshot taken from her phone of the whiteboard after Officer Collrin testified. (T III, 5).

During closing arguments the prosecutor told the jury that the drawings made by defense counsel were exaggerated, including the drawing used to cross-examine Officer Hernandez. (T III, 23). This was misleading because the jury was led to believe that Exhibit C was the drawing used to cross-examine Hernandez. The prosecutor knew that Exhibit C was listed as screenshot of the whiteboard *after* Officer Collrin's testimony, (T III, 41), and she knew the drawing used for Hernandez had been erased. (T III. 5).

The Michigan Court of Appeals rejected this claim holding:

> Defendant now argues that the prosecutor misled the jury regarding Exhibit C because the prosecutor referred to the whiteboard drawings in her closing argument, but did not clarify that Exhibit C represented only the drawing made during Collrin's testimony. There is no merit

> to this argument. Although the prosecutor discussed both drawings in her closing arguments, she accurately informed the jury that "you're going to get a copy of at least the drawing after Officer Collrin testified so you can refer to that." Similarly, the trial court accurately informed the jury that Exhibit C "was a [screenshot] of the whiteboard taken after Officer Collrin's testimony." Thus, it was made clear to the jury that it was being provided with a photographic exhibit of only the drawing made when Collrin testified. Accordingly, there was no error, plain or otherwise. (Op., 11).

The actual language used by the prosecutor was:

> "Now, Mr. Halpern kept going back to this drawing that he created and you're going to get a copy of at least the drawing after Officer Collrin testified so you can refer to that. But what did Officer Hernandez, and Collrin, and the defendant, and I think Mr. Hornung; what did they all say about this? This isn't exactly accurate." (T III, 35-36).

The prosecutor was telling he jury that the drawing used to impeach Hernandez was not accurate and the prosecutor was telling the jury they can use Exhibit C, despite that exhibit not being the drawing in question.

Counsel for Defendant-Appellant sought a copy of Exhibit C, and incorporated herein is the memo from counsel's secretary concerning the efforts to obtain a copy of Exhibit C:

> December 4, 2017
>
> TC to APA Anna Posigian
>
> She said Mr. Halpern drew this on a board and she took the picture with her phone to preserve it—she did not preserve the first drawing.

> It is in the files, however, a B/W only as they generally shred original once scanned. She said they may not have shredded this as it's an exhibit!
>
> December 7, 2017
>
> TC to APA Anna Posigian
>
> I asked about Shelly seeing photo on her phone and she said it was deleted and no longer available.
>
> That what she sent is what she had.
>
> A very short time later (within ½ hour) she sent an email with a VERY enhanced version of what was sent on December 4th with a note that she "reformatted the drawing from the email".

Counsel is still uncertain as to what was provided to the jury and is unable to provide a copy of the exhibit to this Court for review; however, it is the misleading use of the exhibit by the prosecutor that is at issue here.

A prosecutor may not argue facts not in the record, or inferences unsupported by the evidence. See *People v Stanaway*, 446 Mich 463, 686; (1994); *Brocato*, *supra*, 17 Mich App at 295; *People v Watson*, 245 Mich App 572, 588 (2001); *Bahoda, supra*, 448 Mich at 282. When a prosecutor's comments or argument adversely impacts the defendant's presumption of innocence, reversal is proper because a cautionary instruction cannot cure the prejudice. See, *United States v Smith*, 500 F2d 293, 297 (CA6, 1974).

Where a prosecutor's comments violate an explicitly granted right under the Constitution, the comments constitute a constitutional violation. *Hodge v Hurley*, 426 F3d 689, (6th Cir., 2005); *Donnelly v DeChristoforo*, 416 US 637; (1974).

In *Donnelly v DeChristoforo*, supra, the Supreme Court ruled:

> "When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them."

Here, the constitutional right not to have false evidence or misleading argument presented and, the constitutional right to the presumption of innocence.

The only issue for the jury to decide was the credibility of officers Hernandez and Collrin, and the prosecutor misled the jury as to the impeachment provided by the drawings of defense counsel. As the Court noted in *People v Erb*, 48 Mich App 622 (1973), a jury "is heavily influenced by prosecutorial comments." The prosecutor's conduct has prejudicially interfered with and rendered the trial result unreliable for which a new trial is merited.

IV. DEFENDANT-APPELLANT DENIED 14TH AMENDMENT RIGHT TO TRIAL BY AN IMPARTIAL JURY BY TRIAL COURTS OBJECTIVELY UNREASONABLE APPLICATION OF *BATSON V KENTUCKY*, 476 US 79; 106 S CT 1712; 90 L ED 2D 69 (1986) AND MCR 2.511(F)(1).

Standard of Review:

Trial court's factual findings are reviewed for clear error. *People v Cress*, 468 Mich 678, 691 (2003). Trial court rulings are reviewed for abuse of discretion. *People v Hine*, 467 Mich 242, 250, (2002). Guiding this Court in determining if there was an abuse of discretion is whether the trial court's findings of were clearly erroneous; *People v Kalchik*, 160 Mich App 40, 47 (1987); MCR 2.613(C), and whether the trial court committed error. *People v Thomas*, 438 Mich 448 (1991). Claims of constitutional error are reviewed de novo. *People v Rodriguez,* 251 Mich App 10, 25, (2002). The Court will review for clear error a trial court's decision on the ultimate question of discriminatory intent under *Batson*. *Hernandez v. New York,* 500 U.S. 352, 364-365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); *United States v. Hill,* 146 F.3d 337, 341 (C.A.6, 1998).

In *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), the United States Supreme Court held that the Equal Protection Clause forbids the use of peremptory challenges to exclude members of a jury venire because of their race.

MCR 2.511(F)(1) states that no person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex. MCR 2.511(F)(2) states that discrimination during voir dire on the basis of those factors for the purpose of achieving

what the court believes to be a balanced, proportionate, or representative jury in terms of those characteristics is not an excuse or justification for a violation of the rule.

The Supreme Court of the United States has helped to play a role in rectifying some injustices by interpreting the Equal Protection Clause of the 14th Amendment to guarantee certain fundamental protections to a number of stakeholders in the judicial process, from the parties in a case, to the members of the jury, and even to potential jurors. *Swain v Alabama*, 380 US 202 (1965); *Johnson v. California,* 545 US 162 (2005); *Batson*, supra.

"Encompassed within" the Fourteenth Amendment's "mandate of fairness and due process is the right of a civil litigant to request, in certain cases, that legal matters be heard by a panel of impartial jurors." *People v. Bell,* 473 Mich 275, 283; 702 N.W.2d 128 (2005) (citing Michigan Const 1963, art 1, §14). In *Batson v. Kentucky*, the U.S. Supreme Court held that the "[E]qual Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race . . . or the false assumption that members of his race as a group are not qualified to serve as jurors." *Batson*, 476 US at 86.

In so holding, the Court recognized that the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community," because "selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson*, 476 US at 87. Likewise, racial discrimination in jury selection is unacceptable under Michigan law and jurisprudence. See *Bell*, supra; *People v. Knight*, 473 Mich. 324 (2005).

In *People v. Knight*, the Court expressly underscored that in the context of racial discrimination in voir dire, the Equal Protection Clause was not limited to concerns over the rights of defendants and parties, but "the focus is also on the integrity of the judicial system, as well as the rights of the prospective jurors." *Knight*, 473 Mich at 342. The Court noted that "ensuring the integrity of the judicial process and maintaining fair jury selection procedures" was of unquestionable importance and paramount concern. Knight, 473 Mich at 342. The Court concluded, citing *Batson*, that "the striking of even a single juror on the basis of race violates the constitution." *Knight*, 473 Mich 337, n.9 (citing *J.E.B. v. Alabama ex rel TB,* 511 US 127, 142 n. 13).

The *Batson* Court created a three-step test to determine if a party improperly used a peremptory challenge to disqualify a venire member on the basis of race, that was later clarified under Michigan law in *People v. Bell*, 473 Mich at 282-83. Under this test, the party making the *Batson* challenge must initially present a prima facie showing of discrimination based on race. *Bell*, 473 Mich at 282. After the contesting party makes a prima facie showing of discrimination, the burden shifts to the challenging party exercising its peremptory challenge to present a race-neutral explanation for using the challenge. *Bell*, 473 Mich at 283. "The neutral explanation must be related to the particular case being tried and must provide more than a general assertion in order to rebut the prima facie showing." *Bell*, 473 Mich at 283. If the challenging party fails to provide a race-neutral explanation the challenge must be denied based upon the unrebutted inference.

If a race-neutral explanation is presented, "the trial court must decide whether the nonchallenging party has carried the burden of establishing purposeful discrimination."

Bell, 473 Mich at 282. This whole framework is "designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson*, 545 US at 172.

Because *Batson* errors are structural in nature, they are not amenable to harmless error review and require automatic reversal. *Arizona v. Fulminante,* 499 U.S. 279, 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), see also U*nited States v. McFerron,* 163 F.3d 952, 955-956 (C.A.6, 1998).

In this case, the prosecutor used peremptories to remove three African American jurors as to which Defendant-Appellant objected. After consideration, the trial court denied the challenge and the Black jurors were allowed to be removed by the prosecutor.

When Defendant-Appellant exercised a peremptory to Juror Number 5, the prosecution objected, claiming the exclusion was race based as Juror Number 5 was white: the trial court refused to allow a peremptory challenge to be used on that juror, and Juror Number 5 remained on the jury.

Defendant-Appellant moved to renew his Motion to Dismiss at the end of the trial after the alternates were selected, as Juror Number 5 was one of the 12 deliberating jurors: the trial court denied the motion. (T III 54).

Defendant-Appellant submits the trial court committed clear error in findings and abused its discretion in its rulings and denied Defendant-Appellant a fair trial before an impartial jury.

The trial court conducted its own voir dire, and then the attorneys could make inquiry.

The prosecutor conducted voir dire in general, asking questions and then following up with jurors who had raised their hand. This was not the case with juror Nos. 2, 3, and 14. The prosecutor instead singled out the African American jurors and asked specific questions only to them. For example, the prosecutor only asked Nos. 2 and 3 about the difference between television shows like NCIS and everyday police work; as if not necessary to ask the other jurors. (T I, 72).

Similarly, the prosecutor asked Juror No. 14 if her pregnancy interfered and No. 14 indicated she had just seen her doctor the prior day and was able to sit on the jury. (T I, 78).

During the time for the defense to conduct voir dire, Defense counsel asked the array to consider if they were on trial, and had retained him as counsel, and:

> "I'm doing this kind of thing sitting at the table, and I turn to you and I say this is -- I'm taking this jury. I'm accepting this jury. And you look up and you see 12, 14, whatever, you see 12 or 14 people and they're all African American the People who are going to sit in judgment of you. Would you be concerned?" (T I, 84).

Juror No. 5 was the only one to indicate there might be a concern, and offered:

> "I hope that I'm a person that looks beyond that. I work for the Dearborn School District and there's a lot of different culture….I said I work for the Dearborn School District and I enjoy meeting other cultures and working with people getting to know people. I hope I don't look at people's skin color. I don't believe I do. It's their actions." (T I, 84).

Defense counsel had asked the array if they are threatened by open carry of firearms and Juror No. 2 said that it would depend on where they were at, saying it would make him uncomfortable in a bank, or at the airport. (T I, 86-87).

The prosecutor exercised peremptories to excuse jurors No. 3 and 13. (T I, 91). Later the prosecutor used a peremptory to remove Juror No. 2 and Juror No. 14. (T I, 105, 121).

Defense counsel objected to the prosecutor's use of peremptory challenges excusing 4 people, 3 of whom were African American. (T I, 143).

A) Prosecutor peremptories were not based on race neutral reasons.

The trial court clearly erred when ruling that a *Batson* challenge was too late because the juror had been excused, despite voir dire still ongoing, and no jury had been sworn. (T I, 144). This was clear error. To preserve a *Batson* challenge for appeal, a defendant must object before the jury is sworn in. *People v Dixon,* 217 Mich App 400, 404; 552 NW2d 563 (1996), lv den 455 Mich 871; 568 NW2d 84 (1997); *United States v Reid,* 764 F3d 528, 533 (CA 6, 2014); *United States v Tomlinson,* 764 F3d 535, 539 (CA 6, 2014).

The trial court then adopted the reasons given by the prosecutor for excusing the jurors, which itself is clear error. The trial court ruled the reasons passed constitutional muster, but did not state any specific findings, appearing to simply adopt the reasons given by the prosecutor without discharging the final step in a *Batson* claim, failing to determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge

has proved purposeful discrimination. It was an abuse of discretion for the trial court to have refused to make findings and rulings addressing the pretextual nature of the reasoning. See: *People v. Tennille,* ___ Mich App ___ (Nos. 323059, 323314, decided 4/14/16) (remanding to the trial court for comply with the *Batson* requirements where it had accepted the prosecutor's response without further inquiry).

Additionally, we suggest the reasons given by the prosecutor were insufficient on their face, being internally inconsistent, generalized and not disqualifying. Defendant-Appellant submits the proffered reasons were a pretext to disguise the true intention of the prosecutor – to exclude African Americans from the jury. It was an abuse of discretion for this Court to have refused to dismiss the jury and empanel a new array.

i) No race-neutral reason for striking Juror No. 2.

The reason given for excusing Jury No. 2 was essentially that she had a bad short-term memory. (T I, 146).

> MS. POSIGIAN: With regards to juror number two she had what seemed, at least to me, to be a very difficult time with short-term memory. She could not remember the Court's first question when asked what her occupation was and she couldn't remember any of the additional questions after that. She had to ask a few times. Also, she indicated she's having a senior moment here and there. She indicated, when asked about contact with the police, she thought she had been pulled over or she thought she had contact with the police before. She couldn't remember any sort specifics. Same with whether herself or her family were a victim of the crime she thought, yes, maybe robberies or armed robbery or something, I can't remember, I can't remember, I don't remember how long ago, I don't remember anything. So she had a problem with memory and it's the Peoples concern for her that if we're going to hear testimony today and then have a long weekend and come back on Monday. And, so, the likelihood that she would forget

> testimony seemed fairly probable and the People were concerned about that." TI, 146).

Rather than relying on the record, the trial court adopted the false and misleading explanation provided by the prosecutor.

> "Juror number two did indeed have a difficult time with memory she did discuss senior moments. She had to kind of had to step back and reach back in her memory to recall things such as whether or not she had been the victim of a crime, such as -- there were some other specific ones." (TI, 148).

The prosecutor's representation of Juror No. 2's response was both misleading and false when the actual questions and answers are considered:

The prosecutor claimed "She could not remember the Court's first question when asked what her occupation was and she couldn't remember any of the additional questions after that", yet here is the actual exchange with the trial court:

> THE COURT: Thank you, juror number one.
>
> Good morning, juror number two.
>
> POTENTIAL JUROR TWO: Good morning.
>
> THE COURT: I'm going to ask you your occupation, your marital status, and if you are married what your spouse does and your highest level of education?
>
> POTENTIAL JUROR TWO: I'm retired.
>
> THE COURT: And what are you retired from?
>
> POTENTIAL JUROR TWO: Counseling.
>
> THE COURT: Okay.
>
> POTENTIAL JUROR TWO: I was a counselor and I retired a year ago.

THE COURT: Are you enjoying your retirement?

POTENTIAL JUROR TWO: Yeah.

I'm divorced. Level of education Bachelors in Criminal Justice Administration.

THE COURT: Thank you, juror number two. (T I, 39).

When the trial court asked about prior jury service the following exchange occurred:

Okay. Let's start with juror number two. How long ago was that?

POTENTIAL JUROR TWO: Years and years ago but we didn't have to serve because the defendant pled or something and then we left.

THE COURT: Okay. And that was your only time?

POTENTIAL JUROR TWO: Yeah, just the one time. (T I, 43-44).

Later, the prosecutor asked about association with victims of crimes:

MS. POSIGIAN: Now, has anyone on the panel or a member of your family, or a close friend been the victim of a crime? Anybody in the first row? I usually get a lot of yes's on this one so I'm going to take my time and make sure I cover everybody.

Yes, juror number two?

POTENTIAL JUROR TWO: Yeah, we have been -- our family has been but it was a long time ago. I can't remember the years and stuff. Senior moment. I'm 64 so –

THE COURT: I'm not so far behind you.

POTENTIAL JUROR TWO: We have had, you know, robbery and stuff like that but it was, like, a long time ago nothing recent.

THE COURT: Juror number two, is there anything about that experience, even if it was a long time ago that, would affect your ability to be a fair and impartial juror in this case which is a CCW case?

POTENTIAL JUROR TWO: No, ma'am. (T I, 49-50).

The prosecutor also asked the jurors about having been pulled over by the police:

MS. POSIGIAN: Okay. Juror number two?

POTENTIAL JUROR TWO: I'm sure I have been pulled over and stuff like that before but I don't remember how long ago that was. (TI, 63).

The only other prosecutor or court exchange with Juror No. 2 came with a question about television crime shows:

MS. POSIGIAN: Juror number three, TV shows; do you watch CSI, Law & Order, NCIS, any of those shows?

POTENTIAL JUROR THREE: No.

MS. POSIGIAN: Any of those shows.

POTENTIAL JUROR THREE: No.

MS. POSIGIAN: What about you, juror number two?

POTENTIAL JUROR TWO: I wash television. (sic)

MS. POSIGIAN: Now, you know that those shows where they solve the crime in 37 minutes plus commercials that's fantasy, right?

POTENTIAL JUROR TWO: Yes, I do you understand that.

MS. POSIGIAN: Okay. That's not reality.

POTENTIAL JUROR TWO: Yes, I do understand.

> MS. POSIGIAN: Okay. We're not going to solve a crime based on DNA from a fly that was found flying around in the room next door are we?
>
> POTENTIAL JUROR TWO: No. (T I, 71-72).

The record contradicts the prosecutor's version of events, and the claim of bad memory and inability to answer questions is a total fabrication. The only reason for striking Juror No. 2 was not race neutral.

The Michigan Court of Appeals affirmed, but curiously acknowledged that the prosecutor was wrong about its claims made against Juror No. 2 in a footnote: "The prosecutor appears to have erred by stating that Juror No. 2 could not remember a question about her occupation, but the gist of the prosecutor's concern about Juror No. 2 was memory, and the trial court did not clearly err by finding that this concern was supported by the record." (Op. 5, fn 1).

In other words, the prosecutor's claim was erroneous, the record did not support the claim, but no error occurred because the decision was supported by the record. This circular reasoning and affront to fact finding constitutes both an abuse of discretion and clear legal error for which relief is required by way of a new trial.

ii) No race-neutral reason for striking Juror No. 3.

Again the trial court summarily adopted the reasons provided by the prosecutor for striking juror No. 3. The reasons given by the prosecutor were:

> MS. POSIGIAN: As it relates to juror number three who I believe was the first juror that I struck, Ms. Whitford. She clearly did not want to be here. She was refusing to make eye contact with myself asking her questions, she was sitting down rolling her eyes, she had her arms

> crossed a number of points. When the Court asked about real hardships it was my job, it was my kids. The Court asked about medical reasons, oh, I have arthritis. And then also she said she had a torn ligament in her leg and she said it made it difficult for her to sit stand and then she said she had a broken -- and then didn't even tell us what the broken part of her body was. And the People would like jurors that -- I know everyone doesn't necessarily want to be here, it's not their favorite thing, but people that are going to be attentive jurors. And based on her body language and her lack of interaction with me when I was trying to interact with her as well as the multitude of excuses she gave that is the reason that the People excused her. (T I, 149-150).

The trial court parroted the prosecutor's explanation:

> And here the prosecution provided several reasons, and I would concur with her, because the first question out the box with juror number two [sic] was is a one to two day trial a genuine hardship and she was the first person to raise her hand. She then did sit with her arms crossed. I did notice the eyes rolling. She proffered her reasons for not wanting to be on the jury; her job, her children, and physical condition. (T I, 151).

None of the proffered explanation constitute legitimate reasons. Though acknowledging that "everyone doesn't necessarily want to be here…", the only claim being made by the prosecutor is that this juror's life is complicated and, therefore, is incapable of sitting on a jury. Under this logic almost everyone would be unqualified to sit on a jury. Again the only objectively reasonable conclusion is that the prosecutor was impermissibly racially motivated to remove Juror No. 3.

iii) No race-neutral reason for striking Juror No. 14.

When challenged to show a race-neutral explanation, the prosecutor argued:

> MS. POSIGIAN: With regard to juror 14, Ms. Reynolds, it's not on record but Ms. Reynolds was clearly quite pregnant. She indicated that she had gone to the doctor the day before for severe pain. As she's sitting in the jury seat her head was in her hand and she also just appeared to be in extreme pain. It did not appear to the People that she was going to be necessarily inattentive or trying to off the jury but based on her quite extreme pregnancy and the fact that she said she was having sever pains the day before the People had a concern both with her being able to sit through today as well as possibly losing her over the weekend if she has to keep going back to the doctor. But, again, the head in her hands, her eyes are closing, and she's clearly in distress. The People excused juror number 14. (T I, 152).

The trial court ruled that being pregnant was a race-neutral reason. (T I, 155). The problem is that being pregnant was not a legitimate disqualifying event. MCL 600.1307a (1) (c) provides that a juror "Be physically and mentally able to carry out the functions of a juror. Temporary inability shall not be considered a disqualification."

This is especially so, where Juror No. 14 explained her circumstances and medical condition.

The trial court asked Juror No. 14 about her hardship and was told:

> POTENTIAL JUROR FOURTEEN: Mine is just, basically, my kids missing school because I had to, you know, get here early enough because don't get to school until 8:30. (TI, 35).

The prosecutor asked Juror No. 14 about her pregnancy and medical condition, and was told:

> MS. POSIGIAN: Are there any issues with your pregnancy or anything?
>
> POTENTIAL JUROR FOURTEEN: Well --
>
> MS. POSIGIAN: Medically, that would prevent you or make it difficult for you?
>
> POTENTIAL JUROR FOURTEEN: Personally, I don't really want to say that part. But other than that I'll be okay but I do be in pain sometimes. I'm early but I still be in pain now. So I just went to the doctor yesterday for being in pain. Other than that I'm okay right now." (T I, 78).

Defendant-Appellant suggests the reasons given by the prosecutor were insufficient on their face, not supported by the record and not disqualifying. Defendant-Appellant submits the proffered reasons were a pretext to disguise the true intention of the prosecutor – to exclude African Americans from the jury. It was an abuse of discretion for this Court to have refused to dismiss the jury and empanel a new array.

B) Juror No. 5 was required to be excused and a finding of racial discrimination was clear error and contradicted by the record.

The prosecutor objected to the defense excusing white jurors. (T I, 157). The defense exercised a peremptory for juror No. 5, and the prosecutor objected. (T I, 173, 174). The race-neutral explanation stated included:

> MR. HALPERN: Juror number five's father is or was a police officer. Juror number five indicated that she had a felony conviction, although apparently nothing seemed to show up, but I would think the People know what they have a conviction of. There was real closeness…

> MR. HALPERN: Father and brother I think were somehow connected with law enforcement. And there were some personal feelings back and forth that I had when I was questioning her that would seemed to me to be negative. (T I, 175-176).

There indeed was record support for these claims.

When asking the array if anyone had ever been called for jury service, No. 5 said she had, four or five years earlier, and she had been excused. (T I, 44). Later the prosecutor asked if No. 5 actually sat for any of the trial in her prior jury service experience and No. 5 said she "was dismissed from the original panel". (T I, 62).

When asking the array if anyone was associated with law enforcement, No. 5 said she did: "My father, my brother, stepmother, all deputy sheriffs, and military police in my family, nephew and brother." (T I, 46).

Defense counsel asked juror No. 5 if she would accept an all African-American jury to sit in judgment over and her and she responded:

> POTENTIAL JUROR FIVE: I hope that I'm a person that looks beyond that. I work for the Dearborn School District and there's a lot of different culture. … I said I work for the Dearborn School District and I enjoy meeting other cultures and working with people getting to know people. I hope I don't look at people's skin color. I don't believe I do. It's their actions. (T I, 84).

The trial court denied the challenge:

> This record lacks any objective indicia of concern -- concerning the impartiality of juror number five or that she is otherwise unfit to serve as a juror in this case. So I'm going to find -- I'm sorry, let me just double check. I'm going to find that the reason offered is insufficient and I am going to find that the challenger has established purposeful discrimination. So I'm going to keep juror number five on the jury. (T I, 179).

The Michigan Court of Appeals affirmed, holding:

> In sum, although defense counsel articulated reasons for wanting to excuse Juror No. 5 that were race-neutral, the trial court did not clearly err by finding that counsel's attempt to excuse Juror No. 5 by peremptory challenge was motivated by race. We acknowledge that a different court might have reached a different result, but we are to give deference to the trial court's factual findings. We cannot find clear error on the existing record, given the implausibility of so much of defense counsel's proffered explanations. (Op., 7).

The description of implausibility is patently unfair where the actual record demonstrated an out of the ordinary association with law enforcement by juror No. 5, and serious doubt of ability to be fair and impartial by her answers to questions. It was clear error and an abuse of discretion to put an unwanted juror back on the panel to decide Defendant-Appellant's fate. In addition to the structural error, prejudice was manifest as Juror No. 5 deliberated for the verdict, over the objection of the defense. (T III 54).

As gatekeepers of the protections bestowed by the Equal Protection Clause of the 14th Amendment, courts must vigorously defend not just a potential juror's right to not be racially discriminated against in voir dire, but also a party's right to a jury selection process free of racial discrimination. A trial court should be ever mindful of the importance of maintaining public confidence in the legal system, confidence that can be eroded by the appearance of discrimination even where none exists. This Court should vacate the conviction and grant a new trial where the jury is representative of the community and not excluded based upon race.

V. DEFENDANT-APPELLANT DENIED 14TH AMENDMENT RIGHT TO TRIAL BY AN IMPARTIAL JURY BY TRIAL COURTS REFUSAL TO REMOVE JURORS FOR CAUSE.

Standard of Review:

Trial court's factual findings are reviewed for clear error. *People v Cress*, 468 Mich 678, 691 (2003). Trial court rulings are reviewed for abuse of discretion. *People v Hine*, 467 Mich 242, 250, (2002). Guiding this Court in determining if there was an abuse of discretion is whether the trial court's findings of were clearly erroneous; *People v Kalchik*, 160 Mich App 40, 47 (1987); MCR 2.613(C), and whether the trial court committed error. *People v Thomas*, 438 Mich 448 (1991). Claims of constitutional error are reviewed de novo. *People v Rodriguez,* 251 Mich App 10, 25, (2002).

To be entitled to a new trial on the basis of juror misconduct, a defendant must prove (1) that he was actually prejudiced by the presence of the juror in question, or (2) that the juror was properly excusable for cause. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000), citing *People v Daoust,* 228 Mich App 1, 9; 577 NW2d 179 (1998).

Pursuant to MCR 6.412(A), the selection and impaneling of a jury in a criminal case is generally governed by MCR 2.510 and 2.511. MCR 2.511(E) addresses peremptory challenges, and MCR 2.511(D) controls challenges for cause. "[O]nce a party shows that a prospective juror falls within the parameters of one of the grounds enumerated in MCR 2.511(D), the trial court is without discretion to retain that juror, who must be excused for cause." *People v Eccles,* 260 Mich App 379, 383; 677 NW2d 76 (2004).

This issue concerns the trial court's actions in not removing two jurors for cause: the last seated prospective juror No. 14 who could not swear an oath to put her belief that open carry of firearms was wrong, no matter where it takes place; and, juror No. 5, who disclosed a non-qualifying felony conviction.

A) Juror No. 14 should have been removed for cause.

Seat 14 was very active. Originally, Jasma Reynolds was seated at No. 14. (T I, 27). The Prosecutor removed Ms. Reynolds by use of peremptory, (the subject of Issue II), and was replaced by David Owens. (T I, 122). The trial court removed Mr. Owens for cause. (T I, 131). Lori Monkaba then became Juror No. 14. (T I, 132).

When directly asked about open carry laws, Ms. Monkaba said she does not believe people have a right to open carry their weapons. When she questioned about being able to put that opinion and belief aside as a juror, her response was "I think so". (T I, 137-138).

The following exchange then occurred:

> MR. HALPERN: And do you believe your response of I think so, because the judge says put everything aside that you think and feel, do you believe if you were sitting where Mr. Kabongo is that he should be satisfied with that answer as a juror?
>
> POTENTIAL JUROR FOURTEEN: No.
>
> MR. HALPERN: No way, right?
>
> POTENTIAL JUROR FOURTEEN: Right.
>
> THE COURT: I'm sorry. Juror number 14, I didn't hear that?
>
> MR. HALPERN: Pardon me?

> THE COURT: I didn't hear the last part of her answer her voice sort of trailed off.
>
> POTENTIAL JUROR FOURTEEN: It's a lack of confidence. I would do my best to put my judgment's aside and uphold the law. But for him --
>
> MR. HALPERN: You can't guarantee --
>
> POTENTIAL JUROR FOURTEEN: It's not a for sure thing for him to hear me say that. (T I, 138).

As a result of those answers, the defense requested Juror No. 14 Ms. Monkaba be removed for cause. (T I, 141). The trial court denied the request. (T I, 142.

MCL 768.10 provides for removing a juror for cause. The statute indicates that an expression of opinion or impression as declared by a juror is not disqualifying, "Provided, That the person proposed as a juror, who may have formed or expressed, or has such opinion or impression as aforesaid, shall declare on oath, that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial."

The Michigan Court of Appeals found no error holding:

> Despite Juror No. 14's belief that people should not be allowed to openly carry weapons, because she agreed that she would follow the law and would set aside her opinions and feelings about openly carrying firearms, the trial court was not obligated to dismiss her for cause under MCR 2.511(D)(3) or (4). Further, in light of her assurances that she could render an impartial verdict, the trial court's denial of defendant's challenge for cause did not violate MCL 768.10. (Op., 3).

It is an objectively unreasonable determination of facts for the trial and appellate courts to have found that Ms. Monkaba's response was sufficient. She gave no such

assurances and said it was not a sure thing she would set aside her feelings. Ms. Monkaba does not verily believe she can render an impartial verdict. It was an abuse of discretion not to have removed Juror No. 14, Ms. Monkaba. In examining prejudice Defendant-Appellant submits this Court should view the issue under a defendant's constitutional right to a fair and impartial jury and verdict. US Const, Am VI; Const 1963, art I, § 20; *Daoust*, supra at 7 ("A criminal defendant has a constitutional right to be tried by a fair and impartial jury").

In this case, Juror 14, was not qualified to sit as juror and defendant was denied a fair and impartial jury and verdict by the fact that the challenged jurors, sat on the jury. Defendant-Appellant was denial of a fair and impartial jury requires a new trial. *People v Daoust*, 228 Mich App 1, 7-9; 577 NW2d 179 (1998):

"[A] defendant is denied his right to an impartial jury when a juror removable for cause is allowed to serve on the jury. In some circumstances, this is true even when the information justifying the juror's removal is not discovered until after the trial."

B) Juror No. 5 was not qualified to be a juror.

Qualifications of jurors is set forth by statute. MCL 600.1307a provides the qualifications of a juror, and relevant to this issue, is the disqualifying event listed in subsection (e) having been convicted of a felony. There are no exceptions to this rule. A felony is defined in the same statute in section (5)(b): "Felony" means a violation of a penal law of this state, another state, or the United States for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.

Juror No. 5 disclosed she had a prior felony from Illinois when she was a teenager that had not been expunged and she discloses the felony on her job applications, but is told it does not show up (T I, 55-56, 57).

Defendant-Appellant submits Juror No. 5 should have been excluded as a juror, as has happened to her when last called for jury duty, where she "was dismissed from the original panel". (T I, 62).

"[O]nce a party shows that a prospective juror falls within the parameters of one of the grounds enumerated in MCR 2.511(D), the trial court is without discretion to retain that juror, who must be excused for cause." *People v Eccles,* 260 Mich App 379, 383; 677 NW2d 76 (2004). Under MCR 2.511(D)(1), the juror at issue here would have been excusable for cause because he was "not qualified to be a juror," given that MCL 600.1307a(1)(e) provides that "[t]o qualify as a juror a person shall [n]ot have been convicted of a felony."

Under MCR 2.511(D)(1), the juror No. 5 would have been excusable for cause because she was "not qualified to be a juror," given that MCL 600.1307a(1)(e) provides that "[t]o qualify as a juror a person shall [n]ot have been convicted of a felony."

Defendant-Appellant was denied his right to a fair and impartial jury, and the only remedy is a new trial.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellant moves this Honorable Court to make findings and rulings that Defendant-Appellant was convicted upon insufficient evidence and vacate his conviction, and as to the remaining issues find that Defendant-Appellant Kabongo was denied a fair trial and remand for a new trial.

Respectfully submitted by:

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Date: March 26, 2019